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SUPREME COURT U. S.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY,
Plaintiff in Error and Appellant,

vs.

FRANK McMASTER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

PETITION FOR REHEARING.

FRANCIS J. KEARFUL,
Counsel for McMaster.

[19,127.]

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

FRANK MCMASTER, defendant in error in the above entitled cause, presents this his petition for a rehearing of said cause, and respectfully shows the following reasons therefor:

The decision of this court, rendered February 20, 1905, reversed a judgment of the Supreme Court of the Territory of Oklahoma which affirmed a judgment of the District Court of Oklahoma County in favor of McMaster against the City of Oklahoma City for the recovery of two certain lots in said city and damages for the wrongful detention thereof (record, pp. 48, 63). The opinion, delivered by Mr. Justice Peckham, shows that the decision of the court was based upon a plain

misapprehension of the record in two controlling particulars, viz.:

(I.) The title of McMaster upon which his judgment was based was a former adjudication in another case, and, although the record plainly shows a formal judgment rendered in such other case on November 14, 1892, nevertheless it was stated in the opinion that: "*It is plain that there has been no formal judgment entered in the case.*"

(II.) The cause having been considered as depending alone upon the writ of error, a sufficient bill of exceptions was essential to a review, and, although the record contains no bill of exceptions, but only a "case-made" in such condition that, under the settled Oklahoma practice, no question of error in the introduction of evidence could be considered, nevertheless it was stated in the opinion that: "*The record shows a sufficient bill of exceptions.*"

I.

In proof of his title in the trial court, McMaster "introduced in evidence patent from the United States Government to the townsite trustees" (62, 25). He then introduced a formal judgment in his favor against the townsite trustees, *rendered on the 14th day of November, 1892*, which presumably settled his title to the lots in controversy. This appears from the statement made by the territorial Supreme Court, as follows (62):

> "Plaintiff then introduces *judgment rendered in the case of McMaster* vs. *The Townsite Trustees*,

by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.

"Plaintiff then offers in evidence *a further order* of the district judge, Burford, in the same case, *dated October 13th, 1893,* with a certificate of the register of deeds of Oklahoma county, shoving that the same had been recorded in his ofice. Objected to. Overruled. Exception."

And in the opinion it is said (67):

"No appeal was taken from *the findings and judgment* of the district court of Canadian county."

The "case-made" which was before the territorial Supreme Court contains the following recitals of occurrences at the trial (25):

"Mr. Howard: I now desire to offer in evidence a judgment rendered in the case of McMaster *vs.* The Townsite Trustees by Justice John H. Burford on the 14th day of November, 1892.

To which defendant objects *as incompetent, irrelevant and immaterial, and the City of Oklahoma City not being a party to said cause.*

By the Court: Overruled. Let it be marked as an exhibit in the case. You will be given exceptions to all of these offers.

Marked Exhibit B.

Here the plaintiff also offers in evidence a certificate of the register of deeds upon that judgment, showing that it has been recorded in his office in Oklahoma county wherein the land is situated.

Mr. Douglas: Defendant objects as incompetent, irrelevant and immaterial.

By the Court : I will let that be marked under the same order.

To which the defendant excepts.

Plaintiff now offers in evidence *a further order* of the district—by Judge Burford, in the same case, *dated October 13th, 1893*, together with a certificate of the register of deeds of Oklahoma county, that the same has been recorded in his office.

To which defendant objects as incompetent, irrelevant and immaterial.

By the Court: Let it be marked under the same rule.

To which defendant excepts.

Marked Exhibit C."

The order "dated October 13th, 1893," shows on its face that it was in execution of the judgment of "the 14th day of November, 1892." It contains the following statement (38) :

> " It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustees' deed *as decreed by this court on the 14th day of November, 1892*, of the following described premises and real estate: "

It thus appears that the judgment rendered on November 14, 1892, and the order made in execution thereof on October 13, 1893, were both made by the same court, presumably in a case properly brought before it in each instance.

The reason for the misapprehension as to the judgment of November 24, 1892, lies in the absence of such judgment from the record. But surely its omission from the record cannot be ground for holding that it does not exist. The bill of exceptions, if any, is that of the plaintiff in error. Can it be that a plaintiff in error may omit from his bill of excep-

tions a judgment upon which his adversary relies, which is shown to have been introduced in evidence, and which is described in a subsequent order in ~~extension~~ of it as decreeing the title and right to a deed in favor of the plaintiff, and upon such a bill of exceptions argue that a formal judgment never was rendered?

Of course, the court did not intend to sanction any such practice, but was deceived by the presence of a paper in the record which it mistook for the judgment of November 14, 1892. That paper appeared in the place of "Exhibit B," but appears not to have been introduced in evidence unless as a part of Exhibit B. It appears to be a set of findings in the case of McMaster against the Townsite Trustees, but there is nothing to show that the judgment of November 14, 1892, was rendered upon them. The judgment itself might show that they were withdrawn or set aside. The paper is not dated but from the certificate attached it appears to have been drawn up and filed in the clerk's office on or prior to the "11th day of May, 1892" (37), six months before the judgment "*rendered* on the 14th day of November, 1892" (25, 62), which "*decreed*" the title and right of McMaster in and to the lots in controversy (38). McMaster never intended to found any claim of right upon this paper certified to as existing on the "11th day of May, 1892," nor upon the order of the "13th day of October, 1893," apart from the judgment of "the 14th day of November, 1892," to which it specifically referred (38). Certainly, as to this finding of facts and the subsequent order in execution of the judgment,

there was no attempt by McMaster "to piece these two documents together" as in the opinion it is misapprehended. On the contrary, his sole reliance has always been the judgment "rendered on the 14th day of November, 1892," the omission of which from the record, and the futility of discussing its validity and admissibilty in its absence, were pointed out at length in the brief filed in this court on behalf of McMaster on pages 21–22, 10–12. The fact that Judge Irwin in his opinion in the Supreme Court considered the sufficiency of these unauthenticated findings to support a judgment, should not be permitted to prejudice the defendant in error. He had no means of controlling the statements made in the opinion. He consented only that his rights might be adjudged upon the record, and the record simply showed a general finding and judgment in his favor (47–48) based upon a former solemn adjudication, which, although in evidence and before the trial court, was omitted, through inadvertence or otherwise, from the case made by the plaintiff in error.

II.

The opinion of this court shows that the judgment below was reversed for an alleged error in the introduction of evidence, which could not be in the absence of a sufficient bill of exceptions, and it is said that "the record shows a sufficient bill of exceptions." But the record shows only a "case-made," a very different thing from a bill of exceptions, under the provisions of the Oklahoma statutes, borrowed in these respects from Kansas. Okla. Civil Code, 1893,

§§ 311–315, 565–567; *Schumaker* v. *O'Brien*, 19 Kansas, 476, 477; *Herren* v. *Merrilees*, 7 Oklahoma, 261, 266; Brief for McMaster, 18–20. And, although the exceptions stated in a sufficient case-made will be given effect (Civil Code, § 566) it has long been the settled rule in Oklahoma, following in this respect the settled construction of a statute adopted from Kansas, and differing in this particular from a bill of exceptions, that, unless it affirmatively appears that the case-made contains *all* the evidence adduced on the trial, no alleged error in the introduction of evidence can be considered, and that such a defect is not cured by the certificate of the trial judge that it contains all the evidence.

In *School District* v. *Trotter*, 10 Oklahoma, 625, 626–627, the Supreme Court of Oklahoma, by Hainer, J., said:

> "The basis of this action was the contract, which the plaintiff alleges was entered into between herself and the school district, the plaintiff in error. It appears from the case-made that this contract was introduced in evidence, but has been, through inadvertence or otherwise, left out of the record. This court has repeatedly held that where the questions presented to this court for review by the plaintiff in error depend upon the consideration of the evidence introduced upon the trial in the court below, the case-made must contain all the evidence, and this must affirmatively appear in the case-made itself. A mere statement in the certificate of the district judge that it contains all the evidence is not sufficient."

The situation in that case is precisely analogous to the situation in the case at bar. The judgment of November 14, 1892, was the basis of the plaintiff's ac-

tion, and, although it clearly appears to have been introduced in evidence, as heretofore shown, it was, "through inadvertence or otherwise, left out of the record."

To the same effect is *Pierce* v. *Engleheimer*, 10 Oklahoma, 308, 315, and cases cited.

This condition of the record was pointed out and the above authorities were cited in the brief filed on behalf of McMaster in this court at pages 10–12, 19.

The territorial Supreme Court did not pass upon the sufficiency of the present case made, but preferred to rest its judgment on other grounds, and it does not appear that the question was raised or considered. And surely this is not the occasion when this court can be called upon to reverse this settled rule of practice.

Conclusion.

The condition of the record is such that the Court is unable to decide that error was committed, and as the plaintiff in error is responsible for this, to send the case back for a new trial would be to place a premium upon the practice of endeavoring to obtain a review upon a record which covertly omits the vital portion of the case of the defendant in error. In this case, happily, there is enough to show clearly the omission. For these reasons the rehearing should be granted.

Frank McMaster,
By Francis J. Kearful,
Counsel.

FRANCIS J. KEARFUL, counsel for the above named petitioner, Frank McMaster, hereby certifies that, in his opinion, the foregoing petition for a rehearing is well founded and ought to be granted for the reasons therein stated, in order that justice may be done.

WASHINGTON, D. C., March 16, 1905.

FRANCIS J. KEARFUL,
Counsel for petitioner.